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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 733

MCCLATCHY BROADCASTING COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1–8) and its opinion on rehearing (Pet. App. 9–18) have not yet been reported. The decision of the Federal Communications Commission (R. 55–119) has not been officially reported; it is unofficially reported at 9 Pike & Fischer, Radio Regulation 1190.

JURISDICTION

The initial judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the Commission's decision and order, was entered on January 27, 1956. The judgment on rehearing, again

affirming the Commission's decision and order, was entered on November 1, 1956. The petition for a writ of certiorari was filed on January 30, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the Federal Communications Commission, in choosing between two mutually exclusive applicants for a television station license, may consider, along with other factors, the fact that one of the applicants has other broadcasting and newspaper interests in the geographical area involved.

STATUTE INVOLVED

Sections 307 (a), 309 (a) and 310 (b) of the Communications Act of 1934, 48 Stat. 1064 *et seq.*, 47 U. S. C. 307 (a), 309 (a) and 310 (b) provide as follows:

> SEC. 307 (a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.
>
> * * * * *
>
> SEC. 309 (a) If upon examination of any application provided for in section 308 the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.
>
> * * * * *
>
> SEC. 310 (b) No construction permit or station license, or any rights thereunder, shall be

transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 of this title, for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

STATEMENT

Petitioner and Sacramento Telecasters, Inc. ("Telecasters") filed with the Federal Communications Commission mutually exclusive applications for a construction permit for a new television station in Sacramento, California. After full administrative proceedings, the Commission on October 4, 1956, reversing the Examiner's Initial Decision, unanimously granted Telecasters' application and denied that of petitioner (R. 55–119).

The Commission's decision rested on an evaluation of the applicants' qualifications with respect to the various comparative criteria which the Commission has developed over the years as guides to the selection of the best qualified applicant (R. 103–119). The Commission concluded that neither applicant was to be

preferred on its program proposals, proposed staff and equipment, or its methods for ascertaining its listeners' needs (R. 105–8, 114). With respect to the various factors which relate to the likelihood that an applicant will effectuate its proposals and will remain sensitive to the needs of the area, Telecasters was found to be distinctly superior to McClatchy as to local ownership, integration of ownership and management, and participation in the civic affairs of the Sacramento area; McClatchy was found to be superior with respect to the broadcast experience of its principals, and was given substantial credit in this general area of comparison for the outstanding operational record of its several existing broadcasting stations (R. 108–9, 112–114). Finally, because Telecasters would have no connection with any other broadcast station or any newspaper, whereas McClatchy already owned many broadcast stations and newspapers in the general geographical area,[1] Telecasters was held to be substantially superior in terms of diversification of control of the media of mass communications (R. 116–118).

The Commission concluded that McClatchy's experience and record of performance gave slightly more assurance that its program proposals would be ef-

[1] Within the Central Valleys of California, an area approximately 400 miles long and 100 miles wide in which Sacramento is located, McClatchy at the time of the Commission's decision owned five standard broadcast stations, one television station, and three newspapers; in Sacramento itself, McClatchy owns the only 50 kw AM station and publishes one of the two daily newspapers (R. 77–81).

fectuated and that it would remain responsive to the needs of the community than did Telecasters' superiority as to local ownership, integration of ownership and management, and civic participation (R. 113–114). It found, however, that this slight advantage was greatly outweighed by Telecasters' substantial superiority in diversification of control of the media of mass communications (R. 118). Since in all other respects no choice could be made between the applicants, the Commission concluded that the public interest would be better served by a grant to Telecasters (R. 118).

On appeal, the Court of Appeals unanimously affirmed the Commission. It held, *inter alia,* that the Commission could consider, "in connection with all other relevant facts," the diversification of control over the media of mass communications in the comparative evaluation, and that the Commission may "attach such significance to it [diversification] as its judgment dictates" and "is free to let diversification of control of communications facilities turn the balance, if it reasonably concludes that it is proper to do so" (Pet. App. 6–7). The court concluded that, in the present case, the Commission had in fact considered diversification only as one factor among the many it weighed and evaluated (Pet. App. 4–5). After a second oral argument on rehearing,[2] the court,

[2] In its order granting rehearing, the court consolidated the case with another (No. 12,637) involving an appeal by McClatchy from a Commission decision denying McClatchy's petition for reconsideration of an order modifying Telecasters' construction permit to specify new transmitter and antenna sites. The court, in its decision of October 18, 1956, reversed the order denying recon-

on October 18, 1956, again unanimously affirmed the Commission's decision (Pet. App. 9–11).

ARGUMENT

The single question which petitioner raises—whether the Commission may grant a television station license to one of two competing applicants "on the sole ground" that the other applicant has newspaper and broadcasting interests in the area to be served (Pet. 2; see Pet. 11)—is not in fact presented by this case. For, as the Court of Appeals correctly held (Pet. App. 4), the Commission "did not deny it [McClatchy] the construction permit solely because of its ownership of newspapers and broadcasting stations," and "did not find McClatchy superior in every area of comparison save that of diversification of facilities for publishing information." On the contrary, the Commission "found McClatchy superior in some respects and Telecasters superior in some, while in other respects it found no reason for a preference between them" (*ibid.*), and it gave "decisive weight to the factor [of diversification] only after carefully considering all the characteristics and proposals of the two competitors *and finding them almost in balance*" (*id.*, p. 5, italics in original). As noted (see Statement, *supra*, pp. 3–5), this description of the basis of the Commission's decision is correct.

The petition, therefore, presents no novel question, but only the correctness of the application of settled

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sideration and remanded the case to the Commission for further proceedings (Pet. App. 11–18). On January 16, 1957, Telecasters filed a petition for a writ of certiorari to review that part of the judgment (No. 694, this Term).

principles to the facts of this case. For the Commission repeatedly has held that the interests of competing applicants in other media of mass communications in the area are an important factor in determining which grant would best serve the public interest;[3] and the court below, which has exclusive jurisdiction to review Commission licensing orders (Section 402 (b), Communications Act of 1934), consistently has held that, "[i]n considering the public interest the Commission is well within the law when, in choosing between two applications, it attaches significance to the fact that one, in contrast with the other, is disassociated from existing media of mass communication in the area affected * * *." *Scripps-Howard Radio* v. *Federal Communications Commission,* 189 F. 2d 677, 683 (C. A. D. C.), certiorari denied, 342 U. S. 830.[4] This principle represents an

[3] See, *e. g.*, in addition to the cases affirmed on appeal referred to in footnote 4, *infra*, *Port Huron Broadcasting Company*, 5 F. C. C. 177; F. C. C. Public Notice of January 13, 1944, 9 F. R. 702; *Stephenson*, 8 F. C. C. 497; *Bamberger Broadcasting Service, Inc.*, 11 F. C. C. 211; *Southern Tier Radio Service, Inc.*, 11 F. C. C. 171; *Zinn and Golliday*, 11 F. C. C. 419.

[4] Accord: *Plains Radio Broadcasting Co.* v. *Federal Communications Commission*, 175 F. 2d 359 (C. A. D. C.); *Tampa Times Co.* v. *Federal Communications Commission*, 230 F. 2d 224 (C. A. D. C.); *International Broadcasting Corp.* v. *Federal Communications Commission*, 237 F. 2d 205 (C. A. D. C.), certiorari denied 352 U. S. 895; *Columbia Empire Telecasters, Inc.* v. *Federal Communications Commission*, 228 F. 2d 459 (C. A. D. C.); cf. *Pinellas Broadcasting Co.* v. *Federal Communications Commission*, 230 F. 2d 204 (C. A. D. C.), certiorari denied 350 U. S. 1007. The *Scripps-Howard* case is strikingly similar to the instant case. In that case, as here, the losing multiple media applicant had a superior broadcast background, while the prevailing applicant

application to the broadcasting field of the view enunciated in *Associated Press* v. *United States,* 326 U. S. 1, 20, that the First Amendment rests on the assumption that "the widest possible dissemination of information from diverse and antagonistic sources" is essential to the public welfare.[5] See also, *Federal*

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was superior with respect to local residence, integration of ownership and management, civic participation, and diversification.

Petitioner contends (Pet. 26–31) that the legislative history of certain proposed amendments of the Communications Act manifests a congressional intention to preclude the Commission from applying the diversification policy as it did in this case. Those amendments would have prohibited the Commission from promulgating any "rule or regulation * * * the purpose or result of which is to effect a discrimination between persons based upon * * * [the] kind of lawful occupation or business association," or upon "ownership of any medium primarily engaged in the gathering and dissemination of information" (Pet. 26–31). As petitioner notes (Pet. 29–30), however, the amendments were not adopted. The House committee deemed them "unnecessary" because "under the present law the Commission is not authorized" to promulgate any such discriminatory "rule or regulation" and could not "arbitrarily deny any application solely because of any interest or association." H. R. Rep. 2426, 82d Cong., 2d sess. (1952), 18–19. Since the Commission has neither promulgated any rule or regulation relating to the grant of broadcasting licenses to newspapers, nor, as we have shown (see *supra*, pp. 3–5), denied petitioner's application "solely" because of its interests in other mass communication media, this legislative history is not helpful here. Furthermore, at the time that legislation was pending, the Commission was treating diversification as a factor in comparative proceedings, and Congress was so advised. See Pet. App. 23–24.

[5] As the court stated in the *Scripps-Howard* case, *supra*, 683: "Inherent in the thought is the realization that news communicated to the public is subject to selection and, through selection, to editing, and that in addition there may be diversity in method, manner and emphasis of presentation. Such variations may arise from numerous causes."

Communications Commission v. *Allentown Broadcasting Co.*, 349 U. S. 358, 363–364; *United States* v. *Storer Broadcasting Company*, 351 U. S. 192, 203.[6]

There is therefore no merit to petitioner's contention (Pet. 25) that the Commission cannot consider diversification because it is "purely an economic doctrine" having no real relation to the "public interest" standard which is the touchstone for Commission licensing proceedings. Nor is petitioner correct in its claim (Pet. 16) that diversification previously has been considered as a significant factor by the Commission only in situations involving monopoly power. See cases cited, notes 3 and 4, *supra;* cf. *National*

[6] The brief *amicus curiae* of the American Newspaper Publishers Association suggests that this Court in *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470, laid down a rule that (p. 7) "the public interest and convenience *require* the granting of a license or construction permit, as the case may be, to that applicant who demonstrates its ability to render the best practicable service to the community reached by its broadcasts." This standard, it is urged, does not include consideration of diversification as a factor in comparative proceedings. But the argument is based upon a misreading of *Sanders;* that case holds only that the ability of an applicant to render the best practicable service to the community served is "[a]n important element of public interest and convenience affecting the issuing of a license" (p. 475). This Court in *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 216–218 and in the *Allentown* and *Storer* cases, *supra*, has made clear that concentration of the media of mass communication also is a relevant consideration for the Commission in determining which of several competing applicants for broadcasting facilities would best serve the public interest and hence "render the best practicable service to the community." The standard of "best practicable service" hardly precludes consideration of monopoly and diversification factors.

Broadcasting Co. v. *United States,* 319 U. S. 190; *Mansfield Journal Co.* v. *Federal Communications Commission,* 173 F. 2d 646 (C. A. D. C.). Of course, the existence of an undue concentration of control may increase the significance of the diversification factor, just as the existence of numerous other media of communication in the area may detract from its significance. Moreover, as the court below pointed out, an application which merits a preference with respect to diversification will not necessarily prevail; in a substantial number of cases other factors may be found to outweigh this particular advantage.[7]

The weight to be accorded the factor of diversification necessarily depends on the facts of each particular case. In the instant case, diversification assumed greater importance because of the relatively even balance of the two applicants with respect to the other pertinent criteria, and because of Telecasters' wide

[7] The court below stated that its holding "does not mean that the owner of a newspaper is disqualified as a licensee [citing *Stahlman* v. *Federal Communications Commission,* 126 F. 2d 124 (C. A. D. C.)]" or that "the Commission may reject a newspaper's application and grant that of a competing non-newspaper applicant without also considering and comparing all other relevant factors" (Pet. App. 6–7). In several cases, the Commission has selected the applicant associated with other mass media in preference to those having no such association. See, e. g., *Biscayne Television Corp.,* 11 Pike & Fischer, R. R. 1113, appeal pending *sub. nom., Sunbeam Television Corp.* v. *Federal Communications Commission,* Case Nos. 13,180 *et al.,* C. A. D. C.; *The Tribune Co.,* 9 Pike & Fischer, R. R. 719, affirmed, *Pinellas Broadcasting Co.* v. *Federal Communications Commission, supra; Aladdin Radio and Television, Inc.,* 9 Pike & Fischer, R. R. 1; *Orlando Daily Newspapers, Inc.,* 11 F. C. C. 760.

margin of superiority in the area of diversification. But, as the Court of Appeals noted (Pet App. 6), "[t]he responsibility for making the determination [as to the weight to be given the various factors] is committed to the Commission," and "we cannot find that the Commission's decision was arbitrary, capricious or unsupported by substantial evidence" (Pet. App. 8). See also *Pinellas Broadcasting Co.* v. *Federal Communications Commission,* 230 F. 2d 204, 206 (C. A. D. C.), certiorari denied 350 U. S. 1007.

CONCLUSION

The decision below is correct, and no question warranting review is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

McCLATCHY BROADCASTING COMPANY

v.

FEDERAL COMMUNICATIONS COMMISSION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT SACRAMENTO TELECASTERS, INC. IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 733

McCLATCHY BROADCASTING COMPANY

v.

FEDERAL COMMUNICATIONS COMMISSION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT SACRAMENTO TELECASTERS, INC. IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8)[1] and its opinion on rehearing (Pet. App. 9-19) have not yet been reported officially. They are unofficially reported at 239 F. 2d 15, 19. The decision of the Federal Communications Commission (R. 55-119)[2] has not been officially reported; it is unofficially reported at 9 Pike & Fischer, Radio Regulation 1190.

[1] "Pet. App." refers to the separate Appendix filed with the petition for a writ of certiorari.

[2] "R" refers to the Joint Appendix filed in the court of appeals.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the commission's decision and order, was originally entered on January 27, 1956. That judgment was vacated on May 10, 1956, when the court of appeals granted the petition for rehearing filed by petitioner. Following rehearing, a judgment was entered on November 1, 1956 again affirming the commission's decision and order. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, where the Commission has concluded after a comparative hearing between two competing applicants for a television station that there are only slight differences between the applicants in other respects, it may attach decisive significance to the fact that the one applicant is dissociated from existing media of mass communications in the area affected while the other applicant owns radio and television stations and newspapers in the area.[3]

STATUTE INVOLVED

The pertinent provisions of the Communications Act of 1934, as amended, 48 Stat. 1064, as amended, 47 U.S.C. 151 *et seq.*, are set forth in the appendix to the petition for a writ of certiorari (p. 19).

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[3] The above statement was explicitly found by the court below to be a correct formulation of the question presented on the record (Pet. App. 5). Petitioner's markedly different formulation of the question (Pet. 2) was rejected by that court as an "interesting query" which "does not seem to us to be presented here" (Pet. App. 4).

STATEMENT

The concise and accurate Statement contained in the Government's opposition is incorporated by reference herein. In view, however, of petitioner's repeated assertions with respect to its alleged superiority over Sacramento Telecasters, Inc. (hereinafter called "Telecasters") in all significant areas of comparison, it is believed that it will be helpful to the Court to delineate briefly the facts of record and the commission's findings thereon as to certain areas in which Telecasters was decidedly superior to petitioner. In addition, it is proposed to describe the facts of record which led the commission to conclude that Telecasters was entitled to a substantial preference as to the factor of diversification of the media of mass communication (R. 118).

A. Local Residence of Principals

All of the stock subscribers of Telecasters are, or proposed to become,[4] residents of Sacramento; indeed, over 90 percent of them have lived in that community for very substantial periods of time (Fdgs. 20-21, R. 71-75; Concl. 11, R. 112-114). In contrast, petitioner is a wholly-owned subsidiary of McClatchy Newspapers. Most of the beneficial owners of the common stock of McClatchy Newspapers are not Sacramento residents.[5] Except for Miss Eleanor McClatchy, a one-

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[4] All facts are stated as of the time that the record before the commission was completed.

[5]

Beneficial Owner	Percentage	Residence
Eleanor McClatchy	33-1/3%	Sacramento
Charlotte Maloney	33-1/3%	San Francisco
Charles K. McClatchy	11-1/9%	Sacramento
James B. McClatchy	11-1/9%	Fresno
William E. McClatchy	11-1/9%	Fresno

(Fdg. 17, R. 66)

third owner, none of the beneficial owners of McClatchy Newspapers has had a continuing association with the Sacramento community (Concl. 11, R. 112-114).

In light of the above facts, the commission concluded that Telecasters was superior with respect to the factor of local residence (Concl. 11, R. 112-114). This conclusion was sustained by the court below (Pet. App. 7).

B. Integration of Ownership With Management

Telecasters' station will be directly operated by its owners. The full-time general manager of the station will be Mr. Schacht, a 15.45 percent stock subscriber who is also vice-president and a director (Fdg. 20, R. 71-72). Mr. Schacht will report to Mr. William Wright, the president. Mr. Wright is an 11.56 percent stock subscriber who proposes to devote two to three hours a day at the station participating in its management (Fdgs. 20, 23, R. 71-72, 76). The secretary, who is a 5.45 percent stock subscriber and director, will devote about seven and one-half hours a week to the station and expects to act as its local lawyer (Fdgs. 20, 23, R. 71-76). The treasurer, a 3.64 percent stock subscriber, will perform the usual duties of that office (Fdg. 20, R. 71-72).

In addition to the post of general manager, two other full-time key staff positions will be filled by stock subscribers. The program director will be Mr. Pollock, a 5.45 percent stock subscriber (Fdgs. 20, 23, R. 71-72, 76), and the chief engineer will be Mr. Onnigian, a 2.73 percent stock subscriber (*ibid.*). Moreover, Mr. Richards, a 5.45 percent stock sub-

scriber who has extensive agricultural experience, will devote 10 percent of his time to the station's programming as to agriculture and civic activities (*ibid.*). All of the stockholders will meet twice a month to discuss the station's plans, policies and operations (Fdg. 23, R. 76, 77).

Petitioner's proposed television station will have no integration of ownership with management. As the commission noted (Concl. 11, R. 112, 113), "No one having an ownership interest in McClatchy will participate in the day-to-day operation of its television station." While several of the beneficial owners are officers, directors and members of the voting trust, none, except Miss Eleanor McClatchy, the president, has "any say" in the running of the broadcast station (*ibid.*)

On the basis of the evidence the commission concluded that "We also find that Telecasters is superior to McClatchy in its integration of ownership with management" (Concl. 11, R. 112). This conclusion was sustained by the court below (Pet. App. 7).

C. Participation of Principals in Community Life of Sacramento

The principals of Telecasters are intimately involved with the every-day life of Sacramento. Their contact with the business and professional life of the community stems from their individual participation in a variety of representative lines of endeavor (Fdg. 20, R. 71-72). In addition, they have been actively associated in highly responsible capacities with numerous organizations devoted to civic betterment. Telecasters' principals have demonstrated their awareness of and responsiveness to community needs by

their participation in a multitude of fund raising drives for the Community Chest, Red Cross, Boy Scouts, and similar civic organizations (Fdgs. 21, 22, R. 72-76).

Again, the comparison with petitioner is striking. C. K. McClatchy, the late father of Miss Eleanor McClatchy and founder of the dynasty, established a policy of discouraging civic participation by the members of his organization (Fdgs. 19(c), (f), R. 69-71). That policy, like Mr. McClatchy's other policies, has been strictly followed to this day (*ibid.*). It has been noted above that most of the beneficial owners of petitioner are not Sacramento residents. Neither of the two who do reside there (Miss Eleanor McClatchy and James B. McClatchy) participates in civic affairs. They have deliberately avoided such intermingling in the affairs of their city (Fdg. 19(c), R. 69-70). The same policy has been adhered to by other executives of petitioner who hold no ownership interest (Fdg. 19 (f), R. 70-71).

On the basis of the evidence, the commission concluded (Concl. 11, R. 112):

> Over 90% of Telecasters' subscribers are long time local residents of Sacramento who have been very active in civic and local affairs. They represent a good cross-section of the business and professional interest in the community. All of its directors have resided in Sacramento for many years. McClatchy, in effect, is owned one-third by Eleanor McClatchy, who is a native of Sacramento, while the other owners have not had a continuing association with the Sacramento community. The business interests of all of its stockholders, officers and directors are in McClatchy newspaper and broadcast operations. They, be-

cause of McClatchy policy, have not been active in local civic organizations. * * *

The conclusion that Telecasters was superior as to civic participation was sustained by the court below (Pet. App. 7).

D. Diversification of Media of Mass Communication

Telecasters is a new corporation formed specifically for the purpose of operating a television station in Sacramento. It has no other interest of any kind. None of its stock subscribers, officers or directors (except Mr. Schacht), has any interest in newspapers, broadcast stations or any other media for dissemination of mass communication (Fdg. 28, R. 80). Mr. Schacht proposed to dispose of his existing interest in Station KMOD at Modesto (*ibid.*).

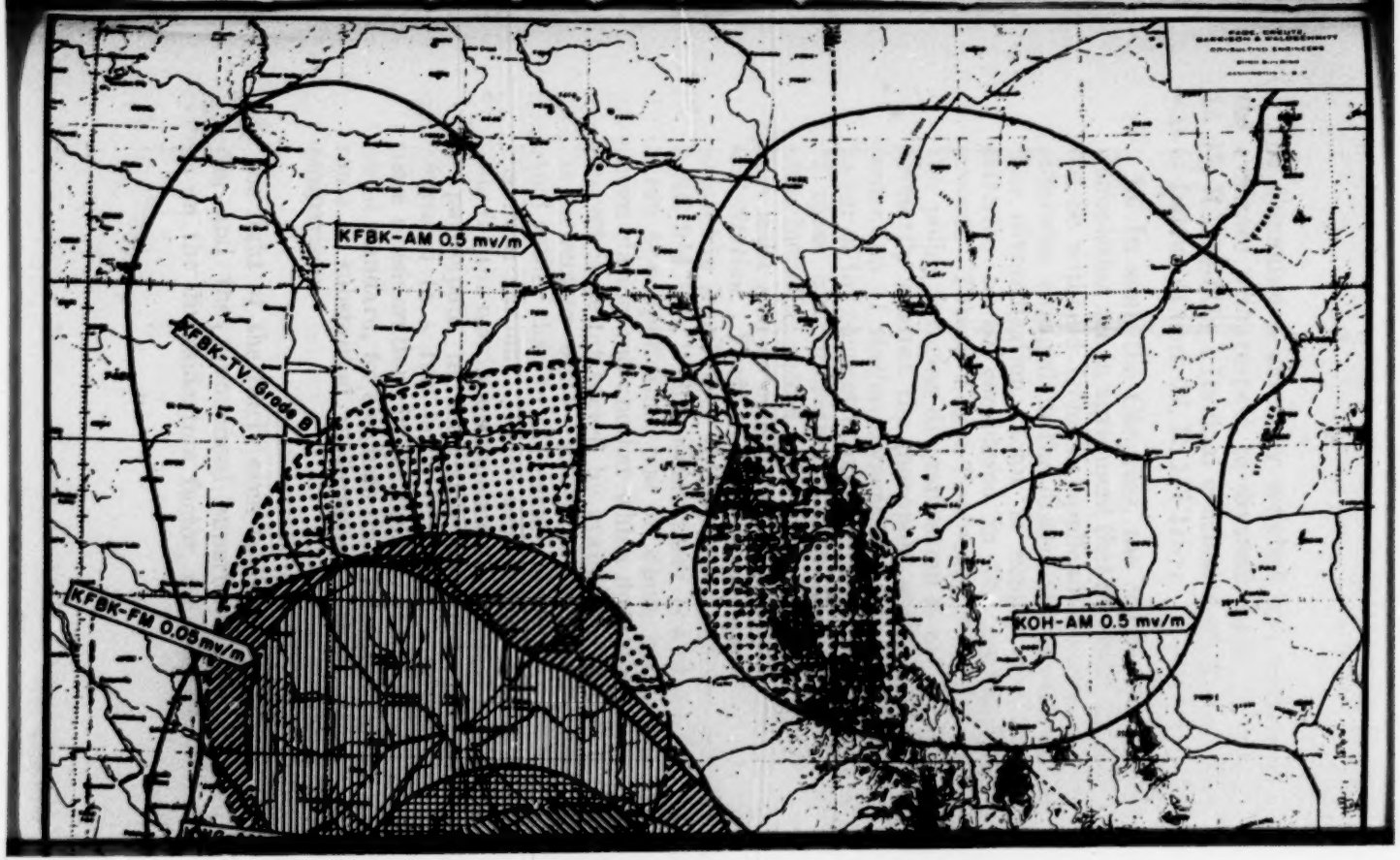
Petitioner is licensee of a number of radio stations with overlapping signals which are received in the Central Valleys of California. McClatchy Newspapers, parent of petitioner, publishes a number of newspapers in the same area. The following table shows the location of the closely coordinated broadcast and newspaper interests of McClatchy affiliated corporations (Fdgs. 24-27, R. 77-80):

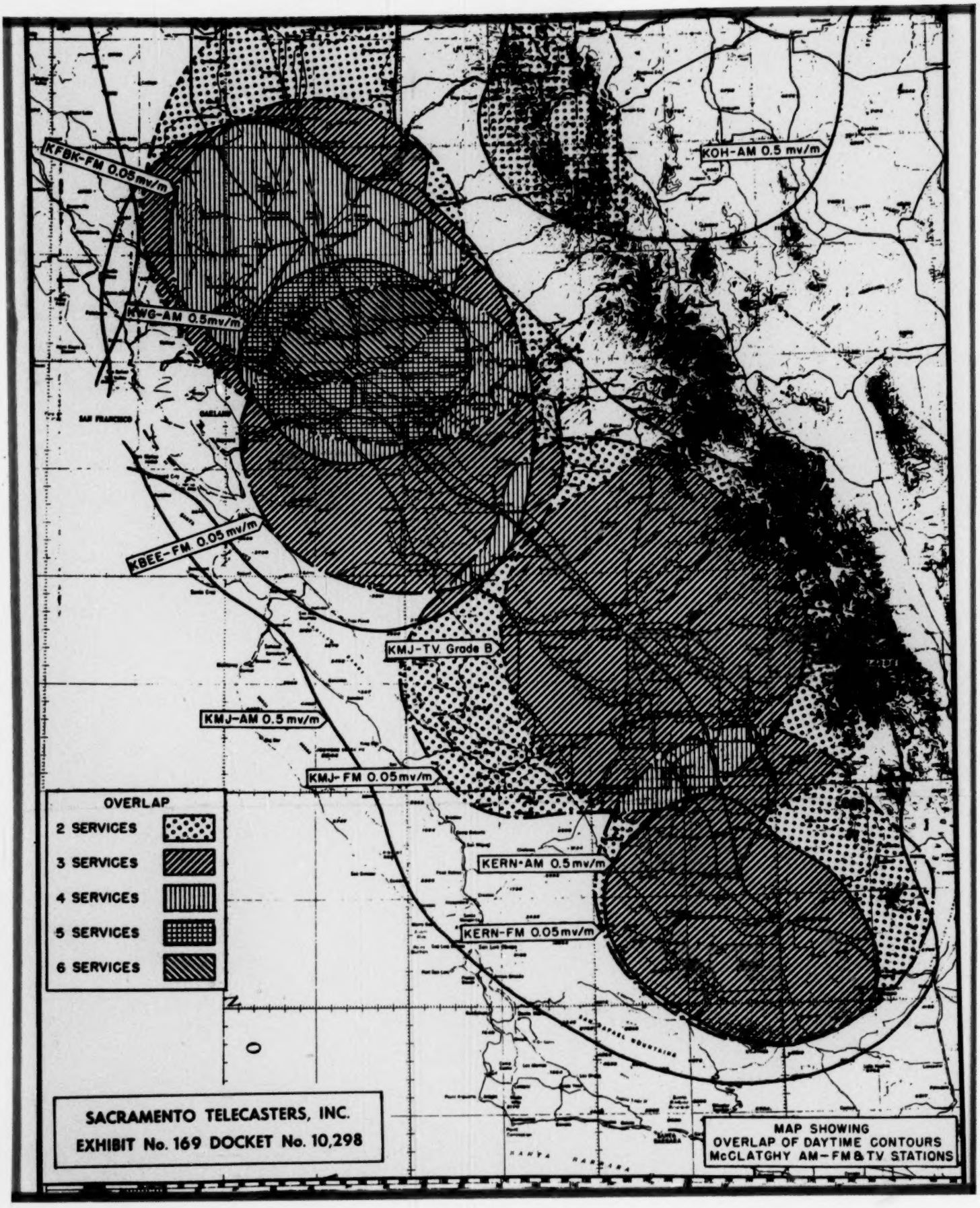
City	Medium	Name or Call Letters
Sacramento	Radio	KFBK-AM KFBK-FM
	Newspaper	*Sacramento Bee*
Fresno	Radio	KMJ-AM KMJ-FM
	Television	KMJ-TV
	Newspaper	*Fresno Bee*
Stockton	Radio	KWG
Bakersfield	Radio	KERN KERN-FM
Modesto	Radio	KBEE-FM
	Newspaper	*Modesto Bee*
Reno, Nevada	Radio	KOH[6]

The extent to which the daytime radio and television services of McClatchy overlap is graphically shown in the map on facing page which was an exhibit in the record before the commission (Telecasters' Ex. 169). It is to be noted that if petitioner's television application for Sacramento were granted, the cities listed below and their environs would receive the following separate McClatchy daytime broadcast signals (*ibid.*).

City	Number of McClatchy Signals
Sacramento	4
Stockton	6
Fresno	3
Bakersfield	3

[6] This station does not serve the Valleys, but it does serve a substantial part of the coverage area of the proposed television station. See Map facing page.


KFBK-AM 0.5 mv/m
KFBK-TV. Grade B
KFBK-FM 0.05 mv/m
KOH-AM 0.5 mv/m


KFBK-FM 0.05 mv/m
KWG-AM 0.5 mv/m
KOH-AM 0.5 mv/m
KBEE-FM 0.05 mv/m
KMJ-TV Grade B
KMJ-AM 0.5 mv/m
KMJ-FM 0.05 mv/m
KERN-AM 0.5 mv/m
KERN-FM 0.05 mv/m
OVERLAP
2 SERVICES
3 SERVICES
4 SERVICES
5 SERVICES
6 SERVICES
SACRAMENTO TELECASTERS, INC.
EXHIBIT No. 169 DOCKET No. 10,298
MAP SHOWING
OVERLAP OF DAYTIME CONTOURS
McCLATCHY AM-FM & TV STATIONS

The Commission carefully weighed and compared the evidence with respect to diversification (Concls. 14, 15, R. 116-117). Its final conclusion on this issue was as follows (Concl. 16, R. 117-118):

> 16. In sum, the Congress, the courts and this Commission are in agreement that a permit should not be withheld from an applicant because it is otherwise engaged in the dissemination of news. The diversification factor is simply one more criterion to be considered in the comparative process. *Tampa Times Company,* FCC 54-1132. Our policy favoring diversification is not directed primarily against the monopoly aspects of concentration of station ownership. The important factor of the concentration of control of the media of mass communication within any particular area, including media other than broadcast facilities must also be considered. *WJR, The Goodwill Station.* Further, we reiterate our view expressed in *Bamberger Broadcasting Service, Inc.,* 3 RR 914, 925, "That where there is a choice between two applicants, one of whom has a television station and another which does not, public interest is better served by granting a license to the newcomer other factors being substantially equal rather than to the person already having a television station. Under this policy, it is possible for the maximum number of qualified people to participate in television and not have it restricted to a few large interests." Weighing these considerations in the light of the public interest standard, we conclude that Telecasters warrants a substantial preference in this area of comparison.

In the light of the fairly even balance as to other criteria, and the pronounced superiority of Telecasters on the diversification factor, the Commission

ultimately concluded that Telecasters was the better of the two applicants (Concls. 13-18, R. 113-118). It granted the application of Telecasters and denied the application of petitioner (Concl. 21, R. 119). The court of appeals unanimously sustained that decision (Pet. App. 7-8, 10-11).

ARGUMENT

The decision of the court below is fully supported by the record and is in accordance with settled legal principles. No question is presented which would warrant review by this Court.

The decision of the Federal Communications Commission which was unanimously affirmed by the court of appeals was a routine decision in a comparative proceeding involving two mutually exclusive applications for the same television channel. Each applicant was found to be superior in certain respects. Thus petitioner was found superior on the basis of prior broadcast record and experience (R. 110-112) while Telecasters was found superior as to the factors of integration of management and ownership, local residence of owners, civic participation, and diversification of the media of mass communication (*supra,* pp. 3-10). After weighing all relevant factors, the commission concluded that Telecaster's substantial superiority in diversification outweighed any preferences in favor of petitioner (R. 116-118).

The court below carefully reviewed the record and determined that the commission's findings and conclusions were fully supported by the evidence (Pet. App. 7-8), and that its ultimate decision was not arbitrary or capricious (Pet. App. 8). Thus the court

of appeals meticulously discharged its review function.[7] *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474.

Petitioner is presumably aware that the questions whether the commission has reached a proper evaluation of factors in a particular case, and whether the court of appeals has reached a correct determination as to the substantiality of the evidence to support the commission's decision, do not constitute certiorari questions. Accordingly, petitioner seeks to have the case considered as though the court of appeals had enunciated a rule of law to the effect that the commission may give overriding weight to the diversification factor, and exclude all other factors from consideration.[8] No such doctrine is to be found in the opinion below—either expressly or by implication. Indeed,

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[7] Had the court gone on (as petitioner seemingly would have had it do), to make its own decision as to whether Telecasters or petitioner was the better qualified applicant, the court would have invaded the proper administrative province of the commission. *National Broadcasting Co.* v. *United States,* 319 U.S. 190; *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U.S. 134; *United States* v. *Pierce Auto Freight Lines,* 327 U.S. 515; *Federal Communications Commission* v. *Allentown Broadcasting Corp.,* 349 U.S. 358, 363-364.

[8] It would of course be improper for the commission to disregard *any* relevant factor affecting the comparison of applicants. But this does not mean that superiority of one applicant as to one factor may not be so significant as to outweigh other factors as to which there is less difference. Thus, in the present case, Telecasters' *overwhelming* superiority as to diversification (*supra,* pp. 7-10) might reasonably have been given decisive weight even if petitioner had been superior in all other respects, which it clearly was not. As has been pointed out, Telecasters was superior in the important factors of local residence, integration, and civic participation (*supra,* pp. 3-7).

the court of appeals specifically held that the question sought to be raised by petitioner was an "interesting query" which "does not seem to us to be presented here" (Pet. App. 4).

The only question actually presented by this case is whether it is unlawful for the commission to weigh the diversification factor along with other factors in choosing the applicant who will better serve the public interest. Even if this were a case of first impression, there could be no serious doubt of the commission's power to follow a policy of encouraging a multiplicity of diverse viewpoints in licensing scarce broadcast frequencies by giving preference to otherwise well qualified applicants who are not already owners of multiple broadcast and publishing interests. See *Associated Press* v. *United States,* 326 U.S. 1, 20; *United States* v. *Storer Broadcasting Company,* 351 U.S. 192, 203. Moreover, this is not a case of first impression.

For a number of years the commission has considered diversification along with other relevant public interest factors, and its action in doing so has been uniformly sustained in a series of cases of which *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission,* 189 F. 2d 677 (C.A.D.C.), *cert. den.* 342 U.S. 830 is typical. The opposition filed by the Government contains a comprehensive review of the authorities. The Government's discussion of those authorities is incorporated herein by reference.

CONCLUSION

For the foregoing reasons, and those stated in the opposition filed on behalf of the Federal Communications Commission, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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